

Zaidi (Migration) [2018] AATA 5666 (17 December 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Syed Hilal Zaidi
VISA APPLICANT:	Ms Nida Zehra
CASE NUMBER:	1607386
DIBP REFERENCE(S):	BCC2015/1963270
MEMBER:	Scott Clarey
DATE:	17 December 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that Ms Zehra meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.211 of Schedule 2 to the Regulations • cl.300.212A of Schedule 2 to the Regulations • cl.300.213 of Schedule 2 to the Regulations • cl.300.214 of Schedule 2 to the Regulations • cl.300.215 of Schedule 2 to the Regulations • cl.300.216 of Schedule 2 to the Regulations; and • cl.300.221 of Schedule 2 to the Regulations

Statement made on 17 December 2018 at 3:23pm

CATCHWORDS

MIGRATION – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – genuine intention to marry – notice of intended marriage – frequent communication – consistent oral evidence – proposed date of marriage – genuine and continuing relationship – substantive and credible plans about future together – decision under review remitted

LEGISLATION

MIGRATION ACT 1958 (CTH), SS 5F, 65

MIGRATION REGULATIONS 1994 (CTH), R 1.15A, SCHEDULE 2 CLS 300.211, 300.212A, 300.213, 300.214, 300.215, 300.216, 300.221.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the visa applicant a Prospective Marriage (Temporary) (Class TO) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 31 December 2014. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on 9 May 2016 on the basis that the visa applicant did not satisfy cl.300.216 of Schedule 2 to the Regulations because the delegate was not satisfied that the parties genuinely intend to live together as spouses. The delegate also found that the applicant did not meet cl.300.612 of Schedule 2 to the Regulations because the delegate was not satisfied that the applicant would adhere to specific visa conditions related to the timing of the prospective marriage.
4. The review applicant and sponsor (Mr Zaidi) appeared before the Tribunal on 12 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence via telephone from Ms Zehra (the visa applicant). The Tribunal hearing was conducted with the assistance of an interpreter in the Dari and English languages.
5. Mr Zaidi was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties genuinely intend to marry and live together as spouses, both at the time of application and at the time of this decision.

Does the visa applicant intend to marry an eligible person?

8. Clause 300.211 requires that at the time of application Ms Zehra intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, according to Departmental records, the intended spouse (Mr Zaidi) is a permanent resident of Australia and was identified in the Subclass 300 visa application. Accordingly, the requirements of cl.300.211 are met.

Was the visa applicant 18 at the time of application?

9. Clause 300.212A requires that Ms Zehra has turned 18. The Tribunal is satisfied that Ms Zehra is over the age of 18. On the evidence before it the Tribunal finds that cl.300.212A is met.

Is the visa applicant sponsored as required?

10. Clause 300.213 requires that at the time of application Ms Zehra is sponsored by Mr Zaidi, and that Mr Zaidi has turned 18. Based on the evidence before it, the Tribunal is satisfied

that Ms Zehra is sponsored by the prospective spouse and that the prospective spouse is over the age of 18. Therefore, cl.300.213 is satisfied.

Have the applicants met in person and are they known to each other personally?

11. Clause 300.214 requires that the parties have met in person since each of them turned 18 and that they are known to each other personally. Based on the evidence before it, the Tribunal accepts that the parties had met in person before the application was made and since they had both turned 18. The Tribunal finds that at the time of application the parties had met and were known to each other personally. Accordingly, the Tribunal finds that the requirements of cl.300.214 were met at the time of application.

Do the parties genuinely intend to marry?

12. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The Tribunal has had regard to a signed letter (dated 4 December 2018) from a registered marriage celebrant that states the parties have lodged a revised notice of intended marriage and that the intended marriage is scheduled to take place on 30 March 2019. The Tribunal notes that both parties gave consistent oral evidence at the hearing about their revised plans for the wedding in Australia. The Tribunal finds that at the time of application the parties had a genuine intention to marry and therefore satisfy the requirements of cl.300.215(a). The revised proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore the requirements of cl.300.215 are met.
13. The Tribunal notes the delegate's concerns regarding the visa applicant's intention to adhere to the visa conditions specified under cl.300.612. The Tribunal does not share these concerns. The Tribunal is mindful that the requirements set out in cl.300.6 are conditions placed on a Subclass 300 visa once it is granted and not part of the criteria to be considered in the granting of the visa itself, which are set out in cl.300.2 and cl.300.3. In any case, the Tribunal notes that the parties have made submissions that they have altered their plans for the wedding since the delegate's decision was made; they have sought and obtained permission from the visa applicant's family for the wedding (nikah) ceremony to take place in Melbourne, after the visa is granted and once the visa applicant has arrived in Australia.

Do the parties genuinely intend to live together?

14. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4).
15. While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.

16. Relevant background to the relationship

17. Mr Zaidi is a 24-year-old Australian permanent resident who was born in Pakistan. Ms Zehra is a 25-year-old Pakistani national who currently lives in Karachi. The parties are first cousins and have known each other since childhood, although Mr Zaidi grew up in Lahore and Ms Zehra grew up in Karachi. During their early childhood, the parties would see each other at semi-regular intervals, usually when Mr Zaidi's family would travel to Karachi for family events and holidays. Mr Zaidi claims his mother died in 2007 and his father died in 2011. Upon the death of Mr Zaidi's father, Ms Zehra's parents (who were also Mr Zaidi's uncle and aunty) agreed to look after the children. In August 2011, Mr Zaidi and three of his four siblings subsequently moved to Karachi to live in the same household as Ms Zehra. Mr Zaidi's older brother stayed behind in Lahore to finish his studies. There was no formal adoption arrangement in place between Ms Zehra's parents and Mr Zaidi and his three siblings.
18. Mr Zaidi said that he got to know his cousin well during this time and came to respect her as a person. The relationship developed as the cousins spent more time together and got to know one another better. Mr Zaidi claimed at the hearing that he told Ms Zehra about his romantic feelings toward her in August 2013 and the pair discussed marriage. Mr Zaidi considers this amounted to a proposal of marriage to Ms Zehra. The parties confided this information in one of Ms Zehra's older sisters, but did not tell her parents at this stage due to a concern about their reaction. During this time Mr Zaidi was going through a formal adoption process by one of his Australia-based uncles (who is also Ms Zehra's uncle), who sponsored Mr Zaidi and his siblings to come to Australia on a Subclass 117 orphan relative visa. This visa was subsequently granted in September 2013 and Mr Zaidi arrived in Australia in May 2014. After arriving in Australia, Mr Zaidi claimed that he told his uncle of his feelings for Ms Zehra and his intention to marry her. The uncle contacted Ms Zehra's father and informed him of Mr Zaidi's intentions and the plans for the marriage began to take shape. The parties' claimed that they spoke almost daily via Whatsapp from 2014. Since 2016, when he claimed he became employed fulltime and had the means to travel, Mr Zaidi has returned to Pakistan on five separate occasions; in September 2016, May 2017, December 2017, January 2018 and most recently in August 2018. Mr Zaidi claimed that the primary purpose of these trips was to see and spend time with Ms Zehra.
19. The Tribunal notes that there was some ostensible inconsistency regarding the date on which the initial declaration of feelings had occurred and whether this constituted a proposal of marriage. At the hearing both parties identified 1 August 2013 as the day on which Mr Zaidi first articulated his feelings for and to Ms Zehra and the parties discussed marriage. The Tribunal is mindful however that in separate personal statements on the Department's file (that are signed but undated), a different date for the inception of the relationship is specified. In the statement signed by Mr Zaidi, he says: '...after about 6 months of knowing Nida [Ms Zehra] we decided to take our relationship seriously as we realised that we had something more than friendship between us and I proposed to her on the 1st of September 2011'. In the statement signed by Ms Zehra, she says: '...After about 6 months of Hilal [Mr Zaidi] moving to Karachi, we realised that we wanted to take our relationship seriously and he proposed to me on the 1st of September 2011'. During an interview with the Department on 21 January 2016, a transcript on the Department's file notes that in response to the question 'when did he [Mr Zaidi] tell you that he likes you?' posed by the Departmental officer conducting the interview, Ms Zehra's response is recorded as 'On my birthday 01/09/2011'.
20. The Tribunal discussed this inconsistency with both parties in depth and at length during the hearing. Both parties said the 2011 date was inaccurate and the true date of this discussion about their feelings was 1 August 2013. Neither party could explain why the 2011 date had been repeated on three separate occasions and/or documents. Mr Zaidi said that the wrong date on the signed statements may have been due to a translation error, when they were being transcribed. He also said many years had elapsed since this time. Ms Zehra made the

point that her birthday is not 1 September but actually 1 August, and she thought the interviewer might have recorded it incorrectly because she would not have misremembered her own birthday. The Tribunal notes that on the original visa application form the parties claimed to have committed to a shared life together on 1 August 2013, which is consistent with the date provided independently by both parties at the hearing. The Tribunal does not know why the date 1 September 2011 was provided/recorded on three separate occasions and/or documents as the date Mr Zaidi declared his feelings for Ms Zehra. After careful consideration of this issue, and considering all of the evidence cumulatively, the Tribunal is prepared to give the parties the benefit of any doubt regarding this inconsistency relating to the date of the relationship's inception. The Tribunal accepts that 1 August 2013 is the date that Mr Zaidi first declared his feelings for Ms Zehra and that the couple discussed marriage.

21. Financial aspects of the relationship

22. The Tribunal has considered the financial aspects of the relationship, including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
23. The Tribunal accepts that Mr Zaidi is currently employed in a named IT networking company doing work related to his studies. Previously Mr Zaidi had worked for a named security company as a security contractor. The Tribunal accepts that Ms Zehra works as an after-hours tutor for school students from her home in Karachi. The Tribunal notes that the parties both demonstrated knowledge of each other's employment histories and financial affairs.
24. The Tribunal accepts that Mr Zaidi has transferred money to Ms Zehra on numerous occasions. The Tribunal has viewed transfer receipts from 11 separate money transfers from Mr Zaidi to Ms Zehra at regular intervals between February 2017 and December 2018, of amounts ranging between \$300 and \$1,900 totalling \$9,544.
25. The Tribunal accepts that the parties do not have a joint bank account, and do not otherwise pool their financial resources in any way. There is no other evidence before the Tribunal of any joint liabilities, jointly owned assets and/or legal obligations owed by the parties in respect of each other.
26. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the parties live in separate countries. Accordingly, their physical separation means that, as at the time of this decision, they will have had limited opportunities to pool their financial resources and share their day-to-day household expenses.
27. The Tribunal places some positive weight on the financial aspects of the relationship.

28. Nature of the household

29. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children, living arrangements of the parties and the sharing of the responsibility for housework.
30. The Tribunal notes that, since 2016, Mr Zaidi has travelled to Pakistan on five separate occasions: in September 2016, May 2017, December 2017, January 2018 and most recently in August 2018. Mr Zaidi claimed that the primary purpose of these trips was to see and spend time with Ms Zehra. The consistent oral evidence from the parties is that Mr Zaidi stayed next door to Ms Zehra on the family compound. The Tribunal notes that since the inception of their claimed relationship, Mr Zaidi claims to have spent approximately 17 weeks

together in the company of Ms Zehra during his semi- frequent trips to Pakistan. The Tribunal accepts these claims. Mr Zaidi explained to the Tribunal that he did not travel back to Pakistan prior to 2016 as he was completing his studies in Melbourne and did not have the financial resources to do so. The Tribunal accepts this.

31. The Tribunal notes that the couple do not share responsibility for the care and support of any children which is unsurprising as the couple do not claim to have any. The Tribunal notes that, at the time of this decision, no evidence has been provided to the Tribunal about any current sharing of responsibility for housework. This is unsurprising given the parties live in different countries and have never lived together on a permanent basis.

32. The Tribunal places some positive weight on this aspect of the relationship.

33. *Social aspects of the relationship*

34. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

35. The Tribunal has considered some evidence relating to the social aspects of the relationship, including photos provided to the Tribunal of the couple socialising together in various settings; signed witness statements by declarants who claim to know the couple; and the largely consistent oral evidence of the parties at the hearing. Both Mr Zaidi and Ms Zehra were able to name each other's closest friends when asked and could recall some details of social activities they had undertaken together, including a specific movie they had watched, specific activities they had undertaken together during Mr Zaidi's most recent trips back to Pakistan and details of a trip they had taken together with family to northern Pakistan in December 2017.

36. On the basis of the evidence, the Tribunal finds that the parties represent themselves to others as being in a genuine and continuing relationship, and that the couple plan and undertake joint social activities. The Tribunal finds that the relationship is viewed as genuine and continuing in the opinion of the couple's family members, friends and acquaintances.

37. In view of the evidence before it, the Tribunal places some positive weight on the social aspects of the relationship.

38. *Nature of the persons' commitment to each other*

39. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.

40. The evidence of the couple is that they have been in a relationship since Mr Zaidi declared his feelings to Ms Zehra in August 2013, having known each other since they were children and after Mr Zaidi had moved in to live with Ms Zehra's family upon the death of his father in 2011. After arriving in Australia, the Tribunal accepts that Mr Zaidi told his uncle of his feelings for Ms Zehra and of his intention to marry her. The uncle contacted Ms Zehra's father and informed him of Mr Zaidi's intentions and plans for the marriage began to take shape.

41. The Tribunal notes that Mr Zaidi's travel history back to Pakistan at regular intervals to visit Ms Zehra is consistent with his oral evidence that he was keen to cultivate and continue the

relationship. The couple's consistent evidence, which is supported by some documentary evidence in the form of telephone and text records on the Department's file, is that the couple spoke almost daily when Mr Zaidi moved to Australia and they continue to do so up to the time of the hearing. The Tribunal accepts these claims.

42. The Tribunal notes that the couple gave generally consistent oral evidence about plans they had made for their future in Australia, in the event that the visa application was successful. This included employment opportunities Ms Zehra may pursue and the couple's plans for their legal wedding in Australia scheduled for 30 March 2019. The Tribunal is satisfied that the couple have had substantive discussions about their future together in Australia and have made credible plans in anticipation of a visa being granted.
43. The couple's evidence about the nature of the relationship and their personal circumstances was relatively detailed and largely consistent. The Tribunal questioned both parties about their familiarity with each other and is satisfied that they both demonstrated knowledge of each other's lives suggestive of a couple in a genuine and continuing relationship.
44. On the basis of the above the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses, and therefore cl.300.216 is met.

Do the parties continue to meet time of application requirements?

45. Clause 300.221 requires that at the time of decision, Ms Zehra continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that she intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses. Having regard to all the evidence of the relationship cumulatively, the Tribunal is satisfied that at the time of this decision Ms Zehra continues to meet the above requirements. Accordingly, cl.300.221 is met.
46. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

47. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that Ms Zehra meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
 - cl.300.211 of Schedule 2 to the Regulations
 - cl.300.212A of Schedule 2 to the Regulations
 - cl.300.213 of Schedule 2 to the Regulations
 - cl.300.214 of Schedule 2 to the Regulations
 - cl.300.215 of Schedule 2 to the Regulations
 - cl.300.216 of Schedule 2 to the Regulations; and
 - cl. 300.221 of Schedule 2 to the Regulations

Scott Clarey
Member